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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 773

In the Matters

—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL) and HADASSAH R. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS

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Appellants R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO respectfully submit this brief in opposition to the motion of Appellee, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (herein "the Bar Association"), to dismiss their appeals.

Introductory Statement

In their Statement as to Jurisdiction, appellants question the validity of §90, subdivision 4 of the New York Judiciary

Law on the ground of its repugnancy to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In its motion to dismiss and supporting brief, the Bar Association does not assert the validity of the statute or its harmony with the Constitution of the United States. It argues that appellants do not present a substantial federal question; that they were not denied due process but were afforded an adequate hearing; and that this appeal does not lie from the order by the New York Court of Appeals denying leave to appeal.

Herein we meet these contentions.

I.

Whether appellants were deprived of their offices and livelihood without due process, in being disbarred automatically without a hearing, presents a substantial federal question

The Bar Association served amended petitions upon appellants, instituting the disbarment proceedings, wherein it pleaded the federal perjury convictions, charged that these offenses were New York State felonies as well as federal felonies, and asked for summary disbarment orders. The said petitions incorporated copies of the indictment, judgments, and orders of probation.

There was no charge of moral turpitude. The Bar Association contented itself with recital of the federal convictions.

The amended petitions asserted that New York Judiciary Law, §90, subdivision 4 required automatic disbarment. Appellants answered that under the Federal and State Constitutions they were assured a full hearing as to their guilt of the offenses of which they had been convicted and

as to their qualifications to continue as members of the Bar; they asked the court to determine that they had not been convicted of a felony under New York law, and not to disbar them summarily but to grant a hearing at which they could have the opportunity to establish their fitness to remain members of the Bar (Siegel affidavit,[1] R. 35-36, 77; Shapiro affidavit, R. 45-46, 34-35).

The Court of Appeals denied leave to appeal, without oral argument or a hearing. The question of the validity of the statute as construed and applied, under the Due Process Clause of the Fifth and Fourteenth Amendments, was squarely presented for decision to the Court of Appeals, and its decision denying leave to appeal necessarily was a holding in favor of the validity of the statute.

The Bar Association contends that the professional death sentences were administered pursuant to due process. It admits that appellants did not have any judicial hearing and were not permitted oral argument before either the Appellate Division or the Court of Appeals. The only claim it makes about a hearing is (Brief, p. 6) that before service of the amended petitions, the two lawyers presented oral arguments and briefs before the Committee on Grievances. But even at that level, appellants—with everything dear and meaningful in life to them at stake—were not granted a hearing. The Grievance Committee did not invite them to appear personally, to give testimony, to offer

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[1] In his affidavit, R. 35-36, Siegel said, in part: "I respectfully allege that the actions of deponent which have been challenged were not a betrayal of the interests or confidences of any clients, or committed with criminal or evil intent, or with intent to commit any wrongdoing, or activated by any selfish interests, pecuniary or otherwise. More specifically, I allege that the acts which have been challenged were performed solely, in order to and in the attempt, to protect the interests of certain innocent clients, as is particularly set forth hereinafter."

witnesses, to cross-examine, to offer character evidence, to explain the nature and circumstances of their acts in question, including their motivation—in short, to experience the basic attributes of a hearing. Cf. *Shaughnessy* v. *United States*, 345 U. S. 206, Mr. Justice JACKSON in dissent, id. at 225. While appellants' counsel was permitted to appear, his participation was limited to argument and a brief on the question whether the federal perjury convictions were equivalent to felonies under New York law; he was not allowed to introduce proof of appellants' innocence or the absence of moral turpitude (Siegel affidavit to Appellate Division, R. 77).[2]

Appellants certainly do not, as the Bar Association mistakenly asserts, "predicate their claim of lack of due process upon the disagreement of the New York courts with their legal contentions" (Brief, p. 4), but upon the Constitution of the United States, decisional authority, and fundamental principles. Nor is the denial to appellants of oral argument by the Appellate Division merely "a procedural matter involving practice in the Appellate Division";[3] it is

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[2] Appellee (Brief, p. 6, third paragraph) concedes, in the following language, that appellants were not accorded, but denied, a hearing before the Grievance Committee: "They contended [before the Committee on Grievances of appellee] that their convictions were not felonies under New York law and that therefore they were entitled to a hearing on the merits of their conduct before entry of disbarment orders. The Committee did not agree and presented the matters to the Appellate Division under subsection 4 of Section 90, Judiciary Law."

[3] The Bar Association is absolutely mistaken in its conception of a New York disciplinary proceeding. In its Brief (pp. 6-7), in attempting to justify the proceedings before the Appellate Division, it states that "Oral argument is often not permitted in an appellate court on motions." This familiar concept has no application. Submission of papers, without oral argument, is not unusual when the appellate court sits as a court of review on a record made below. But here, the Appellate Division was sitting as the court

in and of itself a denial, without due process, of rights secured by the Constitution of the United States. *Standard Airlines Inc.* v. *Civil Aeronautics Board*, 177 F. 2d 18, 21 (App. D. C.).

In *Barsky* v. *Board of Regents of N. Y.*, 347 U. S. 442, this Court upheld the constitutionality of New York State Educational Law, §§6514, 6515. The statute was found to be within the degree of reasonableness required to consti-

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of original jurisdiction, and not as an appellate court. Judiciary Law, §90 provides that "The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law" and grants to the Appellate Division in each department in the State the authority to conduct disciplinary proceedings relating to attorneys. In New York State, the judicial machinery has two modes of operation, and proceedings in the courts are accordingly divided into two classes—actions, which are ordinary proceedings by one person against another, and special proceedings, which are extraordinary or unusual proceedings, but also are litigations in a court of justice. *Application of Callahan, et al.*, 262 App. Div. 398. Unlike an action, a special proceeding is begun, not by a summons, but usually either by a writ issued in the name of the people of the state, or by a court order. Instead of pleadings, in the nature of a complaint and answer, there are usually a petition and return; instead of a trial, there is a hearing; and instead of a judgment, there is a final order. *Application of Burge*, 203 Misc. 677, rev'd on other grounds in 282 App. Div. 219, aff'd 306 N. Y. 811. Appellee likens a disbarment proceeding to a motion. But a special proceeding is not a motion—which is an incidental move or step in a litigation—but analogous in its scope and purpose to an action. A special proceeding is an application for an order, in an independent prosecution of a remedy, and jurisdiction in it is obtained by original process. *Re Callahan, supra.* A motion, on the other hand, is an application in a proceeding already pending, and jurisdiction of it depends upon whether or not jurisdiction has been obtained in the action or special proceeding of which it is a part. *Lyons Falls Farmers' Co-op. Association, Inc.* v. *Moore*, 158 N. Y. S. 2d 1013. A proceeding instituted for the removal of an attorney is a special proceeding and that is precisely why appeal to the Court of Appeals does not lie as of right (*Matter of Mathot*, 222 N. Y. 8). It is obvious from the above description of the New York judicial machinery that a *hearing* should be an integral part of a special proceeding to remove a lawyer from his office, including any proceeding to strike his name from the roll of attorneys.

tute due process of law in the field of health, which is permeated with public responsibility, because the statute provided for, and the doctor-respondent (after conviction and serving his sentence) did receive, a painstaking and complete review of the evidence and the issues at every step of the proceedings against him.[4] This Court remarked at the time: "That statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder." 347 U. S. at 452. The Bar Association fails to deal with *Barsky*, directly or indirectly, yet finds it necessary to recognize that such a decision exists. Squinting at *Barsky* through the wrong end of its telescope, the Association says:

> "We do not view Barsky v. Board of Regents, 347 U. S. 442, as requiring a contrary conclusion."

That is all that the Association, here defending the Judiciary Law against the constitutional infirmity pointed out in *Barsky*, has to say about *Barsky*.

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[4] After affirmance of the contempt conviction, written charges were filed against Barsky with the State Department of Education seeking disciplinary action after due hearing because of the conviction. Upon filing an answer, Barsky was given an "extended hearing" before the Department's Medical Committee on Grievances. Testimony was heard. Then the three doctors, constituting the sub-committee, made a written report of their findings, determination and recommendation, expressly taking into consideration, among other things, "the testimony and letters submitted in support of his [Barsky's] character." Then all ten doctors on the Grievance Committee reviewed the case. Thereafter, the Committee on Discipline of the State Board of Regents held a further hearing at which Barsky appeared in person and by counsel. After reviewing the facts and issues, it filed a detailed report. The Commissioner of Education issued the order, but its operation was stayed by the New York Court of Appeals, pending an appeal to this Court. Barsky then instituted a proceeding in the New York Supreme Court. That court reviewed the record, and the matter then proceeded up to the State Court of Appeals. (347 U. S. at 445-447.)

The Bar Association is here as advocate in a cause it first dealt with as judge. Its Brief in support of this motion so admits (p. 6): it says that appellants contended before its Grievance Committee that "they were entitled to a hearing on the merits of their conduct before entry of disbarment orders. The Committee did not agree . . . " Thus the Bar Association conceives that it shall decide when to take the step—the great, decisive step—of moving to disbar the lawyer and thus end his means of support for his family and himself, and shall also decide whether this shall occur without a hearing. In the County of New York the Bar Association makes the presentation to the Appellate Division. If the Bar Association's position as an advocate before this Court is correct, then everything after its own initial determination is automatic—and the automation derives solely from §90 of the New York Judiciary Law, the statute under attack on this appeal.

Such an advocate, belittling the absence of any judicial hearing whatever in a plenary lawsuit (for such is the nature of a New York special proceeding), and seeking a one-punch knockout by its present motion to dismiss the appeal to this Court, is unmoved by the tolerance and humanity which this Court long ago expressed in *Bradley* v. *Fisher,* 80 U. S. 335 at 355:

> "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family."

The Bar Association, undervaluing a hearing in this case, states (Brief, p. 8) that "the offenses for which appellants were convicted, and which they admit, bear directly upon their fitness to practice." It is not true that appellants "admit" criminal offenses. They pleaded not guilty to the indictment, when convicted they appealed to the United States Court of Appeals for the Second Circuit, and, after affirmance of the convictions there, they filed on April 11, 1959 a petition for certiorari seeking review of the convictions in this Court. They have consistently denied both guilt of the crimes for which they have been indicted and convicted and the commission of any act justifying their disbarment.

It is also untrue that, as the Bar Association states on page 1 of its motion, "the only defenses interposed by appellants in the courts below were law points". The record shows that in addition to legal arguments including the constitutionality of the statute denying them any hearing, they presented lengthy factual considerations which would be urged at a hearing (see Record, pages 35-78, Siegel affidavit, and pages 34-46, Shapiro affidavit, both before Appellate Division). It is the orders below, rather than appellants' arguments, which are based only upon consideration of the legal effect of the judgments of conviction.

What a hearing is worth to lawyers in these circumstances appears dramatically from *Matter of Donegan*, 282 N. Y. 285. After two lawyers had been convicted in the Southern District of New York of the federal felony of conspiracy, and the convictions had been affirmed on appeal (101 F. 2d 829), and after this Court had denied certiorari (306 U. S. 635), the Appellate Division disbarred them "automatically" and without any hearing, pursuant to the predecessor statute of §90(4) of the New York Judi-

ciary Law. Upon Donegan's appeal the New York Court of Appeals reversed the order of automatic disbarment because it found that the federal offense was under New York law a misdemeanor rather than a felony; proceedings were remitted to the Appellate Division, which ordered a reference.[5]

The Referee concluded that the respondents were innocent of the offenses of which they were convicted and that the proceeding should be dismissed. In his report, the Referee found:

> "I am convinced that the respondents have completely answered the charges made against them and have overcome the presumption existing because of the concession that the judgment [of conviction] is *prima facie* evidence of guilt of the offense charged." (265 App. Div. 774, 777.)

The Appellate Division upheld the Referee, noting that he had reached his conclusions, "After an exhaustive inquiry into their [the respondents'] conduct" and refused to overrule him "on account of the verdict of the jury to the contrary in the United States District Court." (265

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[5] In its *Donegan* opinion the Court of Appeals said: "Although disbarment is not strictly a punishment for crime, but only the withdrawal of a privilege • • • it cannot be denied that the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment. Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed. • • • Strict construction • • • of the Judiciary Law requires that the term 'felony' include only those federal felonies which are also felonies under the laws of this State, and exclude such federal felonies as are 'cognizable by our laws as a misdemeanor or not at all.'" (282 N. Y. at 292.) These comments show that the Bar Association exercised a decisive judgment when it set these appellants down for disbarment, declining to accept the contention that the federal felony was a state misdemeanor.

App. Div. at 777.) The Court of Appeals affirmed (294 N. Y. 704).

The Appellate Division, in sustaining the Referee, further remarked:

> "We have read the record with a realization that attorneys should be held to a high standard of integrity. They should not, however, be subjected to the punishment of disbarment except upon evidence, as distinguished from suspicion not sustained by proof." (Id. at 778.)

If the statute had not been construed and applied to deny the present appellants a hearing, and if they had been granted a hearing, they might have established that their conduct was not an offense at all, or at the most constituted a New York State misdemeanor.

Unlike New York law, the federal criminal code does not recognize more than one degree of perjury. In New York, perjury as to material matter—first degree perjury—is a felony (New York Penal Law, §1620-a), while perjury under circumstances not amounting to perjury in the first degree is a misdemeanor (Penal Law, §1620-b). Materiality is what distinguishes perjury in the first degree from perjury in the second degree in New York. Materiality is an issue for jury determination. (*People* v. *Clemente*, 285 App. Div. 258, aff'd, 309 N. Y. 890.)

Because of the rulings made on materiality and other matters at the trial, the record before the Referee might well have differed from that before Judge McGoHEY. In *Donegan*, 265 App. Div. 774 at 778, in sustaining the Referee, the Appellate Division remarked that his report "in many important particulars differs from the record which was under consideration by the Circuit Court of Appeals" when the latter court was reviewing and uphold-

ing the federal convictions of the two lawyers there involved.

At a hearing in the instant case guilt or innocence could have been independently, and differently, determined. The Referee could have found that appellants' allegedly wrongful acts amounted to no more than a mistaken notion of their duty to clients. (Cf. Mr. Justice DOUGLAS, in dissent, in *Barsky, supra*, 347 U. S. at 474.) In *Donegan*, the Appellate Division, in upholding the Referee, said "that those acts in which the respondents participated have not been shown to be discreditable . . . " (265 App. Div. at 778). It is conceivable that the Referee could have so concluded and reported to the Appellate Division in the case at bar.

Again, as in *Donegan*, the Referee could have found that "the respondents have completely answered the charges made against them and have overcome the presumption existing because of the concession that the judgment is *prima facie* evidence of guilt of the offense charged." (265 App. Div. at 777.) And, as in *Donegan*, "After an exhaustive inquiry into their conduct," by the Referee, he could have found "that the respondents are innocent of the offenses of which they were convicted and that the proceeding should be dismissed." (265 App. Div. at 777.)

The Referee could have found that appellants were trying to protect their clients, and undoubtedly would have taken into account the fact that in the State of New York public policy imposes the most stringent duty upon the lawyer to protect confidences of clients. Rule 37 of the Canons of Professional Ethics required appellants to keep sacred and secret clients' confidences learned in the course of their professional employment. This secrecy is considered so essential to the attorney-client relation that New York law allows it to override even the full disclosure requirements of trial. N. Y. Civil Practice Act, §353. New York law

prevents the disclosure by anyone without the client's authorization of any communication between attorney and client made in the course of professional employment, whether such disclosure be to court, jury, legislative committee, government agency, or a disciplinary body. N. Y. Civil Practice Act, §353-a. The name and whereabouts of a client are in proper circumstances confidential communications not to be divulged by the lawyer. *Elliott* v. *United States*, 23 App. D. C. 456; Nos. 259, 428, Opinions of the Committee on Professional Ethics of the New York County Lawyers Association; Drinker, LEGAL ETHICS, p. 136. In New York State, a lawyer has been disbarred for attempting to misuse confidential communications. *Matter of Proujan*, 257 App. Div. 297.

The report of the Referee, in assisting the Court in the matter of any punishment to be dealt out to the appellants, and to each of them separately, doubtless would have noticed, in addition to the motivation of the appellants which was to protect innocent clients and not to aid or benefit themselves, their number of years at the Bar, their reputations and previous spotless records, and their ill health and pressures at the critical periods in question; the fact that they cooperated with the U. S. Attorney's office by voluntarily, completely, and without any bargaining, correcting their testimony and not pleading the Fifth Amendment before the grand jury when coming back to correct their testimony, and the further fact that they themselves furnished all the evidence and proof in the case; the behavior of the prosecuting officials, including the summation of the prosecutor; and the frankness of the appellants when they testified at their own trial in the District Court.

The trial judge tempered the sentence (Statement as to Jurisdiction, Appendix, pp. 21-22). Similarly the Appellate

Division might have decreed a suspension or censure if it did not dismiss the proceeding altogether. The result is unknowable because here there has been a special proceeding devoid of any hearing, with a prejudged result untouched by judicial discretion. In fairness to the Bar Association, it has followed the statute. Judiciary Law §90(4) declares that an attorney convicted of a felony "shall, upon such conviction, cease to be an attorney . . ." In fairness to the courts of New York, they, too, had no alternative; the same statute directs that when a lawyer is so convicted and there is presented to the Appellate Division an authenticated judgment of his conviction "thereupon the name of the person so convicted *shall, by order of the court,* be struck from the roll of attorneys." (Emphasis added.)

II.

These appeals are properly before this Court

The Bar Association argues in its motion to dismiss these appeals and in its Brief that "technically" the appeals are not within the jurisdiction of this Court because the New York Court of Appeals did not decide appellants' cases on the merits but "merely" denied leave to appeal.

The Bar Association cites *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, where this Court had a choice between reviewing a judgment of the Court of Civil Appeals of Texas and reviewing an order of the Texas Supreme Court denying a writ of error therefrom; it had the choice because appeals were brought here from the rulings of both Texas courts; in deeming the reviewable ruling to be that of the Court of Civil Appeals, this Court decided nothing applicable to the instant case.

Here appellants confronted a peculiar situation in that the Appellate Division of the New York Supreme Court

was the court of first instance, although ordinarily it is a court of intermediate appeal. The New York Court of Appeals denied leave to appeal and hence made the only orders having the effect of affirming the disbarment orders of the Appellate Division.

Inquiries of the Clerk of the New York Court of Appeals disclosed that it is that court's practice to refrain from stating in orders denying leave to appeal the issues which have been determined. Instead, the Clerk certified for this Court the *full text* of the motions for leave to appeal *and the printed briefs* which the Court of Appeals considered, as well as certifying the orders now appealed from. Thereby the Clerk actually certified each of the questions which these appellants raised and in effect certified to this Court that these were the questions before the New York Court of Appeals which were submitted to it, considered by all the judges, and decided adversely to appellants; for these are the actions of the Court of Appeals represented by what the Clerk certified. As Mr. Justice CARDOZO, when Chief Judge of the New York Court of Appeals, stated:

> "Motions for leave to appeal have the careful consideration of all the judges of the court, * * *." *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 298.

The record certified to this Court demonstrates that the Court of Appeals necessarily passed upon the substantial merits of the federal question urged here by appellants.

Appellants contended to the New York Court of Appeals that they were constitutionally entitled to a hearing. That court's refusal to hear them necessarily rested upon a finding that this constitutional claim was not good on the merits. Such a finding is the judgment on the merits rendered by the highest State Court in which a decision could

be had, which 28 U. S. C. §1257 requires. *Tumey* v. *Ohio*, 273 U. S. 510; *Van Huffel* v. *Harkelrode*, 284 U. S. 225.

The appeal from the orders of the highest court in the state brings up for review the actions of the Appellate Division. In the State of New York the "court possessed of the record" (Rule 10 of this Court's Rules, paragraph 3) is the Supreme Court, not the Court of Appeals.[6]

Appellants' notices of appeal mention the orders of the Appellate Division and the orders of the Court of Appeals; appellants' record certifies the proceedings in both courts; appellants' notices of appeal were filed in the Appellate Division, whose clerk has separately certified the Appellate Division record. Whether or not "technically" appellants have appealed from the Appellate Division orders, they have done so in substance, and there is no doubt that the Appellate Division decisions are here for review, as well as those of the Court of Appeals.

CONCLUSION

For the foregoing reasons the Court should note probable jurisdiction herein and deny appellee's motion to dismiss the appeal.

Respectfully submitted,

WILLIAM G. MULLIGAN
Counsel for Appellants

Dated: New York, N. Y.
April 24, 1959

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[6] Frederick Bernays Wiener, *The New Supreme Court Practice, A Summary of the New Rules* (1954), 40 A. B. A. J. 659.